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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re NICHOLAS L., a Person Coming Under the  
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

C.X.,

Defendant and Appellant.

F072013

(Super. Ct. No. 13CEJ300089-1)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Mary Dolas,  
Judge.

Carol A. Koenig, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Daniel C. Cederborg, County Counsel, and Brent C. Woodward, Deputy County  
Counsel, for Plaintiff and Respondent.

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Without holding a hearing, the juvenile court denied a Welfare and Institutions Code section 388<sup>1</sup> petition by C.X. (mother) to resume reunification services and grant unsupervised visitation with her son, Nicholas L. We find the juvenile court did not abuse its discretion in finding that mother failed to make a prima facie case and affirm.

## **STATEMENT OF FACTS**

### *Detention/Jurisdiction/Disposition*

On April 3, 2013, the Fresno County Department of Social Services (department) filed a section 300 petition alleging mother failed to provide adequate care and supervision for nine-year-old developmentally delayed Nicholas, due to mother's history of leaving Nicholas home alone. Mother was arrested for child endangerment and for possession of a large amount of marijuana with intent to sell.

At disposition June 20, 2013, the juvenile court declared Nicholas a dependent and removed him from mother's custody. The juvenile court ordered reunification services for mother, including parenting classes, substance abuse evaluation and recommended treatment, mental health evaluation and recommended treatment, and random drug testing. Visitation was ordered between mother and Nicholas, including therapeutic supervised visits. And mother was ordered to have a "14.2.2 psych eval."<sup>2</sup> A six-month review was set for December 12, 2013.

### *Six-Month Review and Department's First Section 388 Petition*

The psychological evaluation report was completed November 12, 2013, and attached to the department's status review report prepared for the six-month review hearing. The psychologist who completed the evaluation opined mother was experiencing symptoms of major depressive disorder, adjustment disorder with anxious

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Respondent explains this is a reference to section 14 of the Fresno County Mental Health Plan Organizational Provider Manual.

mood, and the “possible presence” of delusions and/or hallucinations. The symptoms were characterized as “within the mild-to-moderate range,” but the psychologist “strongly recommended” mother receive professional psychotherapeutic treatment as well as a consultation with a licensed psychiatrist to determine appropriate psychiatric medication. The psychologist opined mother was presently limited in her ability to utilize reunification services because she was not managing her psychiatric conditions and symptoms.

The department’s report for the six-month review hearing recommended reunification services be terminated because mother had limited contact with the department, she was dropped from parenting classes due to poor attendance and she had not followed visitation guidelines, including drug testing before visits. While mother had a substance abuse assessment recommending residential treatment, she had not availed herself of such treatment. The department also filed a section 388 petition to terminate mother’s reunification services, alleging she had failed to make significant progress.

The combined six-month review and section 388 petition hearing was held March 6, 2014. The juvenile court found the department failed to provide reasonable services, as it failed to refer mother for a psychotropic medication evaluation as recommended in the psychological evaluation. The section 388 petition was denied and reunification services continued.

#### *12-Month Review*

The report prepared by the department for the 12-month review scheduled for May 22, 2014, stated mother completed a mental health assessment August 13, 2013, but did not attend therapy until April of 2014, when she began attending biweekly. After failing to attend a number of appointments with a substance abuse specialist and numerous follow up staffing meetings, mother finally entered a 90-day residential substance abuse treatment program, which included parenting classes, in April of 2014. Although she was told to register for random drug testing in April of 2013, mother did not do so until

August of 2013, when she tested positive for methamphetamine. Due to mother's failure to follow visitation guidelines and maintain sobriety, mother visited Nicholas only twice in the six months preceding the 12-month review. The social worker recommended reunification services be terminated and a section 366.26 hearing set.

Following a July 3, 2014, contested 12-month review hearing regarding the 12-month report, the juvenile court found the department had provided reasonable services, that continued placement was necessary, but that mother, while "slow coming to the realization that she does need to make changes," had made real progress. Reunification services were continued and an 18-month review hearing was set.

#### *18-Month Review*

The department's report prepared in anticipation of the 18-month review hearing stated mother continued to blame the department for not returning Nicholas and she seemed unclear why Nicholas was removed. Mother had participated in the psychotropic medication evaluation, but since mother did not feel she needed or wanted psychotropic medication, she had not provided a copy of the evaluation. As of July 30, 2014, mother completed the 90-day residential substance abuse treatment program and denied having a current substance abuse problem. During the reporting period, mother did not participate in random drug testing, but had only two clean spot tests, which she did to allow for visitation. The visits with Nicholas were inconsistent because mother continued to resent the visitation guidelines. Mother opted to discontinue therapy. The social worker opined that mother continued to lack insight into the need for substance abuse or mental health services, and she had not been able to progress beyond supervised visits due to her inability to interact well with Nicholas. The department recommended services be terminated and a section 366.26 hearing set.

At the November 6, 2014, contested 18-month review hearing, mother testified she completed her 90-day inpatient treatment program and had come to understand she had a substance abuse problem with marijuana and why Nicholas was removed from her. She

claimed she no longer associated with drug users. Mother had drug tested once or twice a week with negative results. Mother testified she had a mental health assessment and was told she did not need treatment, although she had participated in individual and group therapy twice a month for approximately six months. While mother participated in the medication evaluation, she did not feel she needed medication. Mother was residing in a four-bedroom house with her boyfriend of four years and his parents, and they had a room for Nicholas. Mother was working part-time.

The juvenile court found there were many unanswered questions in the department's evidence because the information in the report was outdated and a new social worker had been assigned. The juvenile court ordered an updated psychological evaluation, an update from the department regarding bonding between mother and Nicholas, drug testing, mother's attitude towards receiving help, why visits were still supervised, possible movement towards unsupervised visits, and visitation with relatives. The parties agreed to a continued 18-month review hearing on March 19, 2015.

#### *Mother's First Section 388 Petition*

On November 10, 2014, mother filed a section 388 petition requesting increased and extended unsupervised visits. In the petition, mother alleged she successfully completed an inpatient substance abuse treatment program in July of 2014, had negative drug tests, had been clean and sober since April of 2014, had completed a parenting program, and had a room for Nicholas in her home. The juvenile court granted the petition a week later.

#### *Department's Second Section 388 Petition*

In January 2015, the department submitted a section 388 petition seeking to revert back to supervised visits. As alleged by the department, mother took Nicholas to her home on December 9, 2014, without approval as the adults residing in the home had not yet been cleared. In addition, mother tested positive for methamphetamine on January 2, 2015. The juvenile court did not set a hearing on the petition as it was untimely noticed.

*Continued 18-Month Review Hearing*

In the report filed for the March 19, 2015, continued 18-month review hearing, the department stated mother continued to insist she did not need help and refused any mental health services. Mother tested negative for drugs, with the exception of the positive January 2, 2015, test. She denied using drugs, but entered a substance abuse aftercare program January 20, 2015, and was doing well. While mother continued to have unsupervised weekly visits, the department had not increased visits due to the suspicion that mother had taken Nicholas to her house in December 2014 without permission and tested positive for drugs in January. The social worker had not obtained a bonding study because it would require expert evaluation by someone able to work with a child with limited verbal expressive skills. The social worker reported mother appeared to be bonded with Nicholas, but although Nicholas identified mother as his mother, there were no reports that she brought him safety or comfort or that he independently asked to speak to her or visit her when he was not with her. The social worker recommended reunification services be terminated and a section 366.26 hearing set.

Mother had an updated psychological evaluation, dated February 2, 2015, by the same psychologist who did her earlier evaluations. The purpose of the evaluation was to determine mother's present psychological state, whether mother was responsive to treatment services, and the level of risk Nicholas would experience if returned to mother. The psychologist reported that mother had been initially guarded and irritable about engaging in the evaluation, but became more responsive over time. Mother conceded she was mildly depressed, but claimed the symptoms were manageable and she did not need clinical treatment. Mother did not display obvious deficiencies in her general mental/cognitive functioning; she denied experiencing delusions; she displayed good impulse control; and she had good knowledge and understanding of how to effectively parent. Nevertheless, the psychologist concluded she had inadequate insight and questionable judgment. The psychologist found mother had a defensive "faking good"

response and a failure to respond consistently, which produced invalid test findings pertaining to her personality/psychopathology and child abuse potential. According to the psychologist, because of mother's defensive and inconsistent response style, the assessment was unable to produce an accurate representation of mother's psychological state to fully determine whether Nicholas would be at risk in her care or whether she could be responsive to services to eliminate the risk. The evaluation concluded mother's failure to acknowledge, address and treat her mental health and substance abuse problems could potentially impair her ability to properly care for Nicholas and place him at significant risk of danger and harm. The psychologist recommended therapeutically supervised visits and supervision and regulation of mother's mental state, behavior, emotions, and sobriety.

At the March 19, 2015, continued 18-month review hearing, mother testified she was cooperative and honest during the second psychological evaluation. She believed she was currently not in need of therapy or medication. She claimed she had tried to contact her social worker daily during the preceding three months, but was only able to see her once in January. Mother regularly drug tested negative, except for once on January 2, 2015, which was positive for methamphetamine. Mother denied using methamphetamine, but explained she had the flu the week previous and had taken cold medication, including Sudafed. According to mother, she had not used marijuana for two years and had not used methamphetamine since April 2014. After the positive drug test in January, she had enrolled in an outpatient substance abuse treatment program because the social worker requested she do so. She attended the program and also attended AA/NA meetings about three hours a week. Mother wished to have Nicholas returned to her care and had a room for him at the house. Mother's boyfriend, with whom she shared a home, had not been cleared by the department and she acknowledged he had a criminal record and was on probation or parole. She denied ever taking Nicholas to her home

against regulations, and believed she was capable of caring for him and getting him to his various appointments.

The social worker disputed mother's claim that she did not return her calls. According to the social worker, mother had not called her since receiving the referral to the substance abuse after program January 20, 2015. At that time, mother orally declined therapy and signed a staffing sheet verifying that she was refusing therapy.

Following the contested hearing, the juvenile court terminated reunification services and set a section 366.26 hearing. In doing so, the juvenile court stated it believed mother had been unwilling to address any psychological issues and found mother's explanation for the January 2015 positive drug test unpersuasive. In addressing mother, the juvenile court stated:

“Major depressive disorder is not something that ... just goes away. And the fact that you're doing nothing about it, that you have refused to address it, that you have refused to participate meaningful[ly] in an evaluation to see where you are now with those issues just leaves us in a situation where we cannot say with any confidence at all that it would be safe for your child to be returned to your care. [¶] ... [¶] You have not addressed your mental health issues. You have a dirty test two months ago. You have been clean and sober for two months. That is not a track record of sobriety that any court could look at as convincing that you have resolved your substance abuse issues, which are clearly related to your mental health issues. You're a woman in a lot of pain who has had to turn to drugs, most likely as a result of an inability to live with that pain on a sustained basis. So we would need to see a track record of sobriety that you have not provided.”

The juvenile court also explained to mother that her boyfriend “might be a disqualifier in and of itself.” Visits between mother and Nicholas were changed to therapeutically supervised. Mother was advised of her writ options but did not file a writ.

#### *Mother's Second Section 388 Petition*

Two and one-half months later, on June 5, 2015, mother filed another 388 petition, again seeking additional reunification services and unsupervised visits. Mother alleged she had participated in random drug testing with negative results; participated in



therapeutically supervised visits with Nicholas; completed outpatient substance abuse treatment April 20, 2015; was participating in therapy on her own at Fresno Family Counseling Center and was on a waiting list for MediCal paid therapy; and she had a home where Nicholas would have his own room. Mother alleged the requested modifications would be in Nicholas's best interest because of his strong attachment to her and she would be able to provide a safe, stable and sober home for him. Mother attached various letters to her petition, stating she had completed outpatient treatment, chronicling the numerous way she had greatly changed her life, and that she was a trusted employee.

The matter was placed on calendar for initial hearing June 16, 2015. At that hearing, the matter was continued to June 25, 2015, the date of the section 366.26 hearing, for the department "to provide rep[or]t as to 388."

The department's response to mother's petition, filed June 24, 2015, stated that, while mother had begun weekly therapy on April 30, 2015, she had not provided the therapist with the psychological evaluation and had not signed a release for the therapist to speak with the social worker. The social worker was able to find out from mother's counselor at the outpatient treatment program that mother had completed outpatient treatment and half of aftercare services. Mother made some improvements while in the program, but the counselor's last contact with mother was on April 20, 2015. The department acknowledged that mother had had only one positive drug test, in January of 2015, had completed parenting classes on July 15, 2014, and that mother had been gainfully employed for seven months. Mother had attended weekly therapeutic supervised visits, but had, at times, inappropriately communicated with Nicholas about the case, causing him to become notably "anxious." The social worker conceded mother and Nicholas "have a relationship."

The social worker opined that, despite improvements on mother's part, mother continued to be in need of supervised visits, as mother had unresolved mental health issues and needed to continue building parenting skills. The social worker concluded

mother had not demonstrated the “safety capacity” to progress to unsupervised visits. A permanent planned living arrangement was recommended, as there was no one willing to provide a permanent plan of adoption or guardianship for Nicholas.

At the hearing June 25, 2015, the juvenile court heard argument from all counsel concerning the merits of the section 388 petition. Mother’s counsel requested a continuance because the department’s report had been filed only the day before and the department’s recommendation was for a permanent plan of legal guardianship rather than planned permanent living arrangement. The juvenile court granted the request and continued the non-evidentiary hearing on the section 388 petition to July 14, 2015.<sup>3</sup>

At the July 14, 2015, hearing, the department argued mother had not demonstrated changed circumstances or that further reunification services would be in Nicholas’s best interests. The department also argued mother was ordered to but had not completed a psychotropic medication assessment. Nicholas’s counsel also argued mother had not demonstrated that further reunification services would be in Nicholas’s best interest or that there were changed circumstances. Mother’s counsel stated she had not intended to “reargue the 388 petition as we did at the last hearing,” and requested a “trial.”

In denying mother’s petition without a further hearing, the juvenile court found insufficient evidence of changed circumstances, stating:

“So I’m finding based on the petition, itself, it identifies mother, again, after so much time is making an effort now to participate in services and to look at making changes in her life to hopefully one time have a[n] opportunity to see if she can reunify ... that’s essentially what we’re being asked today, to further delay that sense of stability and permanency to see if mother will continue in these efforts successfully. I hope she does. I think she’s made wonderful progress. But it’s unfortunate this effort wasn’t initiated two years ago when the case first came. But perhaps if she continues these efforts she will be able to demonstrate a clear change of circumstance. But right now, she’s just now participating in the services and activities that were recommended almost over two years ago. So I

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<sup>3</sup> The section 366.26 hearing was continued to August 27, 2015.

acknowledge her progress but it's still in the beginning stages. We still don't have sufficient evidence that it's going to remain or that there's a lifetime commitment to these changes. And that's what needs to be demonstrated in order to, I think, permit Nicholas to be in a vulnerable situation to see if he can return home. So I am denying the petition on its face at this time for not showing a changed circumstance or that it would be in the minor's best interest at this time ...."

## DISCUSSION

Mother's only contention on appeal is that the juvenile court abused its discretion in summarily denying her section 388 petition. She argues that she was entitled to a hearing because she established a prima facie case of changed circumstances and that reinstatement of services and unsupervised visits was in the best interest of Nicholas. We disagree.

Section 388 provides, in pertinent part: "(a)(1) Any parent or other person having an interest in a child who is a dependent child of the juvenile court ... may, upon grounds of change of circumstance or new evidence, petition the court ... for a hearing to change, modify, or set aside any order of court previously made .... [¶] ... [¶] (d) If it appears that the best interests of the child ... may be promoted by the proposed change of order ... the court shall order that a hearing be held ...."

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] A parent need only make a prima facie showing of these elements to trigger the right to a hearing on a section 388 petition and the petition should be liberally construed in favor of granting a hearing to consider the parent's request. [Citation.]" (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

"However, if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interest of the child, the court need not order a hearing on the petition.

[Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citations.]” (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.) “In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case.” (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.) “We review the juvenile court’s summary denial of a section 388 petition for abuse of discretion.” (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

In evaluating whether a parent has met the burden to show changed circumstances, the juvenile court should consider: (1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent child and parent and caretaker; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.) These factors become less significant once reunification services have been terminated, as in the instant case. This is because, “[a]fter the termination of reunification services, ... ‘the focus shifts to the needs of the child for permanency and stability’ [citation] ....” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

In her petition, mother did not request return of Nicholas to her custody, instead she asked for additional reunification services and unsupervised visits. The basis for her petition/request was that she participated in random drug testing with negative results, she participated in therapeutically supervised visits with Nicholas, she completed outpatient substance abuse treatment on April 20, 2015, she was participating in therapy on her own, and she had a home with a room for Nicholas. She also alleged the requested modification was in Nicholas’s best interest because of his strong attachment to her and her ability to provide a safe, stable and sober environment for him.

However, by mother asking for additional reunification services rather than placement, mother was asking for something that was not legally possible. Mother had

already had 18 months of reunification services<sup>4</sup>, the statutory maximum. (§ 361.5, subd. (a)(3).) Services had been terminated in March 2015, almost three months before mother asked for their resumption. Mother cites no authority allowing reunification services to be started beyond the statutory maximum in the same dependency. In short, mother's request was for something which, if not legally impossible, was certainly beyond the court's discretion to grant. (See *Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1509-1511 [“order extending reunification services [beyond statutory maximum] exceeded the court's jurisdiction.”].)

In any event, mother's request did not make a prima facie showing of changed circumstances. In her petition, mother alleged changed circumstances in that she was participating in random drug testing and the tests were negative; she was participating in therapeutically supervised visits with Nicholas; she completed outpatient substance abuse treatment on April 20, 2015; she was participating on her own in therapy; and she had a home where Nicholas would have his own room. But none of these factors were new to the juvenile court; all had been addressed at the continued 18-month review hearing in March of 2015, and represented, at best, changing, but not changed, circumstances. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358 [“changing circumstances is not sufficient to require a hearing on the merits of ... section 388 petition”].)

In addition, mother did not show the requested change was in Nicholas's best interests. Her petition alleged reunification services and unsupervised visits would be in Nicholas's best interests because her attachment to Nicholas was the “strongest attachment he has had throughout his life.” She also alleged he would benefit from the skills she learned in parenting classes and through the supervised visits, and that she was able to provide him a safe, stable and sober home environment. But again, these factors

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<sup>4</sup> The 18-month review hearing was actually held 24 months after Nicholas was removed from mother.

were addressed and found insufficient at the continued 18-month review hearing just three months previous. And while mother requested unsupervised visits, she did not claim the other members in her home had been cleared by the department as required, particularly her boyfriend who had a criminal background. (*In re A.S.*, *supra*, 180 Cal.App.4th at p. 358.)

For all these reasons, we conclude the juvenile court did not abuse its discretion with a summary denial.

In addition to her argument that a *prima facie* case was made under section 388 warranting a full evidentiary hearing, mother argues further that it was error for the juvenile court to consider a report filed by the department addressing the merits of her petition and then denying the evidentiary hearing on the petition. Mother argues, “The effect of this was to admit the Department’s evidence, while depriving the mother the right to cross-examine on, test, or rebut the evidence.” We disagree.

First and foremost, the record is clear that the juvenile court’s ruling did not turn on any facts alleged or asserted in the department’s June 24, 2015, report. In denying the petition, the juvenile court specifically stated, “I’m denying the petition on its face at this time for not showing a changed circumstance or that it would be in the minor’s best interest at this time since services were just recently terminated ....” There is nothing about the juvenile court’s reasoning, as expressed in its ruling, that suggests the ruling was based on anything more than the facts asserted in the petition itself, and on the factual and procedural history of the case, which is entirely proper for the court to consider. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1161; *In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

In addition, mother had an opportunity to consider the department’s report and to supplement her own petition after reviewing the report. The department’s report addressing mother’s petition was received June 24, 2015. At the hearing the next day, June 25, 2015, mother’s counsel requested, and was granted, a continuance to allow

mother and counsel time to review the report. At the continued hearing, July 14, 2015, the juvenile court gave all counsel an opportunity to argue the matter further and it received additional documentation from mother. There is no showing in the record that the juvenile court improperly relied on information in the department's report not already included in mother's petition or known from the factual and procedural history of the case.

**DISPOSITION**

The juvenile court's order is affirmed.

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FRANSON, J.

WE CONCUR:

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KANE, Acting P.J.

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PEÑA, J.